93-319

AUG 26 1993

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN P. RASCH,

Petitioner,

VS.

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer under the religious accommodation provision (section 701(j)) of Title VII must prove that it made an active and bona fide effort to accommodate an employee's accommodation request except in those rare instances where a particular job is completely incompatible with a particular religious practice.

2. Whether the trial court could properly grant summary judgment for an employer in a religious accommodation case once the employee had submitted evidence that the employer, upon the exercise of reasonable diligence in an accommodation search, would have found a position which would have provided a reasonable accommodation.

3. Whether an employer must consider using available voluntary substitutes as a means of accommodation regardless of the existence of a bona fide seniority system.

4. Whether an employer violates Title VII by ignoring its own discipline policy for the sole reason that its employee's work absences were compelled by religious beliefs.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Stephen P. Rasch, the petitioner, and National Railroad Passenger Corporation, D/B/A Amtrak, the respondent.

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PETITION FOR WRIT OF CERTIORARI

Stephen P. Rasch petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit. The opinion and judgment of the court of appeals was entered in this case on March 23, 1993. The Petition for Rehearing and Suggestions for Rehearing En Banc was denied by two separate orders both entered on May 28, 1993.

OPINIONS BELOW

The judgment of the Court of Appeals for the District of Columbia Circuit disposed of the case without opinion under D.C. Cir. Rule 14(c) "substantially for the reasons stated by the district court in its October

10, 1991, memorandum opinion." The court of appeals judgment is unpublished and is reprinted in the Appendix herein at 1a, *infra*.[1]

The Memorandum Opinion of the United States District Court for the District of Columbia, which was entered on October 11, 1991, is unreported and is reprinted in the Appendix herein at 6a, *infra*.

JURISDICTION

Invoking federal jurisdiction under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, and under 28 U.S.C. § 1331 (general federal question jurisdiction), the petitioner brought this suit in the United States District Court for the District of Columbia. On October 11, 1991, the district court entered summary judgment in favor of the defendant National Railroad Passenger Corporation (hereafter "Amtrak") and against petitioner Stephen P. Rasch. *See* pp. 6a-18a, *infra*.

On petitioner's appeal, the United States Court of Appeals for the District of Columbia Circuit on March 23, 1993, entered a judgment affirming the district court's judgment. *See* p. 1a, *infra*. Thereafter a timely Petition for Rehearing and Suggestions for Rehearing En Banc was filed with the court of appeals. The court of appeals on May 28, 1993, entered two separate orders denying the petition for rehearing as well as the suggestions for rehearing en banc. *See* 3a-5a, *infra*.

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[1] References to the Appendix to this brief are referred to as "(___ a, *infra*);" references to the appendix to the birefs filed with the Court of Appeals for the District of Columbia are referred to as "(A ___)."

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin,. . . .

STATEMENT OF THE CASE

A. Relevant Facts

During the first week of his employment with Amtrak, petitioner Stephen P. Rasch notified his supervisor that his religious convictions prevented him from working from sundown Friday to sundown Saturday (A 390). Rasch's religious beliefs as a member of the Worldwide Church of God require that he not work during his Sabbath (A 386). He was advised by his supervisor to work the Extra Board because that would be the easiest position to accommodate his Sabbath needs (A 673 at ¶ 18). Rasch was also advised not to seek a transfer to a different location because it would merely transfer the problem rather than resolve it (A 637-38 at ¶ 19).

In order to self-accommodate his religious beliefs, Rasch found a volunteer, E. L. Boyd, who offered to work for him when he needed to be off on his Sabbaths (A 213, 221-22). Rasch also on many occasions went to the Amtrak personnel office to see the posted

vacancy notices (A 410-26). On one occasion, Rasch learned of a controller's position which was available in Washington. Rasch inquired of his supervisors, but he was discouraged from transferring to that position (A 411-13).

Later, Rasch learned of a conductor's job which was available in zone 2 (another work zone). Rasch spoke with one of his supervisors who confirmed that the position was a five day a week job (A 515-20). Rasch also spoke with another supervisor about the possibility of such a transfer, and this supervisor indicated that the zone 2 position would afford him a better opportunity to satisfy his Sabbath needs (A 414-17). Rasch had the qualifications to hold the zone 2 position (A 521). Despite the fact that this position would have made it easier for Amtrak to accommodate Rasch's religious beliefs, his transfer request was denied (A 414-15).

Rasch also asked E. S. Bagley, Amtrak's General Superintendent, whether there was anything that Mr. Bagley would prefer that Rasch do in light of his religious needs (A 419-20). Rasch also sought information about transferring to a conductor's position in zone 4, but when he spoke with his supervisor about such a transfer, he was told that the transfer would merely transfer the problem (A 421-23).

Rasch experienced no difficulty in obtaining his Sabbath hours off through 1977 and up to February 6, 1988 (A 260). A complaint, however, was made by a union representative who did not feel that religion was an acceptable reason for Rasch to be off during his Sabbath. This complaint from a union representative brought the matter to the attention of the Transportation Superintendent for the Washington di-

vision of Amtrak (A 510-14). A counseling session (apparently to counsel Rasch that he should work on his Sabbath) was held. At this counseling session, the Transportation Superintendent for the first time told Rasch that those working on the Extra Board were required to protect all vacancies and that this was a condition of his employment with which he would be expected to comply (A 497).[2]

At that time, the Transportation Superintendent instructed Rasch's supervisors not to permit him off work during his Sabbath hours (A 502-03). It is common practice, however, for Amtrak employees assigned to the Extra Board not to call the crew dispatcher or "mark up" when they have completed an assignment. This practice is known by management. To Rasch's knowledge, however, he is the only employee who has ever been discharged or even been brought up on charges for such a claimed violation (A 201, 398-400).

His supervisors were well aware that Rasch did not mark up after completing work close to the time when his Sabbath was to start. The reason Rasch did not mark up close to his Sabbath was because marking up was in essence a commitment to Amtrak that he

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[2] If Rasch had been told by his supervisors during his first six months at Amtrak that he would not be permitted to have his Sabbaths off while working on the Extra Board, he could have transferred back to his previous employment with C & O (A 427-28). Unfortunately, Rasch was not informed that at Amtrak when an employee is assigned to work the Extra Board, he is expected to be available seven days a week, 24 hours a day. All Rasch understood was that if he was not available for that period of time, he would lose his 40 hours guaranteed pay (A 438-39).

was available for work (A 284). Even though Rasch's supervisors knew that Rasch's religious convictions prevented him from working during his Sabbath, instead of attempting to locate another position to which Rasch could transfer, they brought charges against Rasch demanding his discharge (A 201-02). In disciplining Rasch, his supervisors only focused on Amtrak's absenteeism policy without considering the company's requirement of attempting to accommodate Rasch's religious needs (A 495-96).

Management made no effort to accommodate Rasch's Sabbath requirements prior to his firing (A 201-02, 266, 278-79, 343, 492-93). The first time management attempted to accommodate Rasch's religious needs was after he was fired and reinstated through the grievance process when Stanley Eastman, Amtrak's EEO Manager, informed Rasch's supervisor about the need to accommodate Rasch's religious needs (A 494-95, 496, 508).

Prior to Rasch's discharge, on August 8, 1988, Amtrak's Transportation Superintendent issued Amtrak's guidelines for absenteeism (A 262). The policy required the administration of progressive discipline. Under this policy, an employee must be "advised, in writing, to improve his or her attendance and that failure to do so may result in disciplinary action." (*Id.*). Further, under the policy "[i]f the employee is absent on one (1) other occasion within sixty (60) calendar days following receipt of the letters specified above, formal disciplinary action *may* be instituted." (*Id.*) (Emphasis supplied.)

In Rasch's case Amtrak admits that it did not follow its progressive discipline policy because Rasch's religious beliefs would not permit his working from

sunset Friday to sunset Saturday (A 182 at ¶ 27; 255-56, 262, 273-74, 355-60, 647). Significantly, Rasch was not terminated because Amtrak had exhausted all efforts at attempting to accommodate his religious needs, but rather as discipline for his absences (A 269, 617 at ¶ 13).

B. Amtrak's Motion For Summary Judgment

Pursuant to Local Rule 108(h), Amtrak filed with its motion for summary judgment a statement of material facts as to which no genuine issues exist. Nowhere in Amtrak's statement of material facts does it assert that the seniority provision of the collective bargaining agreement prohibited the voluntary swaps of employees with similar qualifications. Nowhere within the four corners of that document did Amtrak allege any facts to establish that it had sought, but was unable to locate, a position within Amtrak's system to which Rasch could have been transferred which would have accommodated Rasch's scheduling requirements without undue hardship to Amtrak.

Rather, Amtrak's statement of material facts concentrates on the "Extra Board" position to which Rasch was assigned at the time of his discharge from Amtrak detailing the fact that Rasch could not work from sundown Friday to sundown Saturday and thus was repeatedly unavailable for work assignments (*see* A 602-06 ¶¶ 18-42 and A 607-08 ¶¶ 46-51). Amtrak's only assertion of attempts to find a position for Rasch, according to its own statement of material facts, occurred in 1989 after Rasch was fired and subsequently reinstated by Amtrak (A 609-10 ¶¶ 54-60).

C. The District Court's Opinion

The district court specifically found:

(1) Except for certain excused absences which Rasch's immediate supervisor provided during the early days of his employment at Amtrak, "Amtrak took no affirmative action to accommodate Rasch's religious needs." (*See* 12a, *infra*);

(2) "Amtrak took no steps in negotiating with Rasch to reach an accommodation and did not seek the cooperation of the UTU in attempting to satisfy Rasch's religious requirements." (*Id.*);

(3) "Amtrak apparently never explored with UTU the possibility of allowing another employee, A. L. Boyd, to voluntarily work in Rasch's place on Rasch's Sabbath." (*Id.*);

(4) In October of 1988—one month before Amtrak terminated Rasch—an employee junior in seniority to Rasch was awarded an assistant conductor position in Salisbury, North Carolina, a position which did not require Friday evenings or Saturdays work and which therefore could have accommodated Rasch's religious needs. (*Id.*);

(5) "[N]either Amtrak nor Rasch was aware of . . . [the filling of the assistant conductor's position in Salisbury, North Carolina, by an employee junior in seniority to Rasch] until after the position was awarded since neither knew whether an employee senior to Rasch would have applied for the job." (*Id.* at 12a-13a);

(6) "Because of the collective bargaining agreement, the junior employee could not be bumped from the [Salisbury] position until April, 1989, and by that

time Rasch had been terminated from Amtrak employment." (*Id.* at 13a);

(7) After Rasch was reinstated to Amtrak's service as a result of a grievance procedure, on September 30, 1989, Rasch bid on and was awarded the assistant conductor's position in Salisbury, North Carolina, which position accommodated Rasch's Sabbath needs. (*Id.* at 13a);

(8) Amtrak did not dispute that Rasch had met his *prima facie* case in the summary judgment proceeding. (*Id.* at 15a).

The district court examined three alternative means of accommodation which it found that Rasch had proposed to Amtrak: (1) the use of substitutes (*id.* at 16a); (2) the "blanking" of positions (*id.* at 16a-17a); and (3) transferring Rasch to another job within its system (*id.* at 17a).

As to the use of voluntary substitutes to cover for Rasch, the court disposed of this alternative by stating that "[b]ecause assigning substitutes, volunteers or not, to replace Rasch on his Sabbath, would clearly violate the seniority system established by the collective bargaining agreement between Amtrak and UTU, Amtrak need not make such an accommodation." (*Id.* at 16a).

With respect to the "blanking" of positions on Rasch's Sabbath, the court held that though Amtrak could save money by blanking positions, such an accommodation need not be made. The court found that "[b]ecause Amtrak does not regularly blank positions even though it may save money by doing so, and due to the frequency with which Amtrak would have to operate a short crew to accommodate Rasch, blanking

the position would create an undue hardship." (*Id.* at 17a).

With reference to Amtrak transferring Rasch to another job within the organization which would accommodate Rasch's Sabbath, the court looked only at the Salisbury, North Carolina, position stating "[i]t is undisputable, however, that Amtrak could not have known that Rasch could have held that position, or any other position for that matter, until after all of the applications were filled, due to the seniority system under the collective bargaining agreement." (*Id.* at 17a).

The court thereupon concluded "that Amtrak was unable to make any accommodation of Rasch's religious beliefs without suffering undue hardship and, therefore, did not violate the provisions of Title VII." (*Id.* at 18a).

D. Judgment Of The Court Of Appeals

The United States Court of Appeals for the District of Columbia determined that the case did not warrant an opinion and under D.C. Cir. R. 14(c) entered judgment without an opinion, stating:

> The district court set out the "unique circumstances of this case" that established Amtrak's inability to accommodate to Rasch's religious beliefs without undue hardship. We find no cause to disturb the judgment made on the record before that court. It is therefore
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> ORDERED AND ADJUDGED, substantially for the reasons stated by the district court in its October 10, 1991, Memorandum Opin-

ion that the judgment from which this appeal has been taken be affirmed.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

"SABBATARIANS NEED NOT APPLY" is the message broadcast by the courts below. The judicial system has once again diminished the congressional promise of equal employment opportunity. Ironically, although this Court has guaranteed by constitutional interpretation of the Free Exercise Clause of the First Amendment the right of Sabbath-keepers to unemployment compensation, *see Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 883 (1990), a number of circuits, including the circuit court below, have embraced the view that they can negate by judicial interpretation religious accommodation at the labor market which was mandated by the political process.[3]

The decision below is in direct conflict with the Ninth Circuit and is at odds with decisions of the Sixth Circuit as to the proper scope and extent of the duty imposed by the religious accommodation requirement of section 701(j) of Title VII as well as the

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[3] In *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. at 890, the Court found "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . ." Now the political process has been frustrated by the judicial branch, and Sabbatarians once again have been placed at a disadvantage.

teachings of this Court in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

This Court has dealt with the area of religious discrimination on only three occasions. The first was *Dewey v. Reynolds Metals, Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). In *Dewey* the Sixth Circuit held that Title VII's religious discrimination provision did not require a reasonable accommodation. This Court was equally divided, however, as to whether Title VII required an employer to attempt to accommodate the religious needs of its employees. As a result, section 701(j) was added to the 1972 amendments to Title VII on the floor of the Senate without a single dissent. This provision made it an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of its employees and prospective employees.

The second case—*Trans World Airlines v. Hardison*, 432 U.S. 63 (1977)—examined the reach of the religious accommodation provisions of section 701(j) of Title VII, 42 U.S.C. § 2000e(j).

The most recent decision of this Court concerning religious discrimination and accommodation was *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). *Ansonia*, however, dealt with the narrow question of whether an employer is required to choose from available accommodations the alternative accommodation preferred by the employee and did not deal specifically with the accommodation duty or the undue hardship defense.

Thus, a single decision of this Court has been the sole guidance to the lower courts with regard to the

extent of the accommodation duty under section 701(j) of Title VII and how the undue hardship defense fits in to the legislative scheme of accommodation. The lack of greater guidance by this Court in religious accommodation cases has resulted in courts applying the religious accommodation provisions of Title VII in an uneven and inconsistent manner.

I. An Employer Must Prove That It Made An Active And Bona Fide Effort To Accommodate An Employee's Religious Accommodation Request Except In Those Rare Instances Where A Particular Job Is Completely Incompatible With A Particular Religious Practice.

Through the enactment of section 701(j), Congress placed a burden on the employer to engage in active and bona fide efforts to accommodate the religious needs of its employees and, if unsuccessful, then to demonstrate that it was unable to reasonably accommodate the employee's religious beliefs without undue hardship. *American Postal Workers Union v. Postmaster General*,781 F.2d 772, 775-76 (9th Cir. 1986); *Lake v. B.F. Goodrich Co.*, 837 F.2d 449 (11th Cir. 1988), *cert. denied*, 488 U.S. 826 (1988). Amtrak failed to demonstrate on summary judgment that it engaged in active and bona fide efforts to accommodate Rasch's religious needs, and it certainly has failed to demonstrate an absence of other possible accommodations. Amtrak merely points to Rasch's failure to accommodate himself and berates him for remaining on the Extra Board where he was told to remain by his superiors.

The district court acknowledged that there is a split in the circuits as to whether an employer must dem-

onstrate that it sought to accommodate before attempting to prove undue hardship, stating:

> Rasch argues that if a defendant does not attempt to accommodate an employee's religious needs, it may not raise as a defense the impossibility of accommodation without undue hardship. The court rejects Rasch's argument. Although the cases which Rasch cites, *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978), and its companion case, *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978), support Rasch's position, subsequent cases have expressly disapproved of those holdings. *See Townley* at 625, citing *Ansonia*, 479 U.S. at 68-69. As the *Townley* opinion states, "If an employer can show that no accommodation was possible without undue hardship, it makes no sense to require that he engage in a futile act." *Id.* Although some courts deciding religious discrimination claims have required employers to show that they have made accommodation efforts, those generally have been in a factual context where accommodation to the employee's religious practices appear possible. *See*, e.g., *EEOC v. Ithaca Industries*, 849 F.2d 116 (4th Cir. 1988), *cert. denied*, 488 U.S. 928 (1988), a case in which the defendant-employer was not bound by a seniority system.

(*See* 14a n.3, *infra.*)

The district court failed to mention other decisions which have held that proof of an effort by the em-

ployer to accommodate the religious practices of an employee is required before the employer can be allowed the undue hardship defense. *McDaniel*, 509 F. Supp. 1055 (W.D. Mich. 1981), *aff'd*, 696 F.2d 34 (6th Cir. 1982). In *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d at 221, the court stated:

> Title VII prohibits an employer from discharging an employee because of his religion. To avoid such unlawful discrimination, an employer must attempt to accommodate an employee's religious needs.

See also Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1, 6 (D. Ore. 1973); *EEOC v.Sterling Merchandise Co.*, 46 FEP Cases 1448, 1454 (N.D. Ohio 1987).[4]

But even the cases which suggest that under specific circumstances the employer need not prove that an accommodation attempt was made as a precondition to introducing evidence of undue hardship still recognize that the exception to the general rule is narrow and extremely limited. In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986), this Court stated that "the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer *any* reasonable accommodation without such hardship." (Emphasis supplied.) This exception was explained in *Toledo v. Nobel-Sysco., Inc.*, 892 F.2d 1481, 1489 (10th

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[4] The court in *Edwards v. School Bd. of City of Norton, Va.*, 43 F. Supp. 620, 626 (W.D. Va. 1980), in rejecting the employer's "undue hardship" defense, said that "[t]he law requires more direct evidence than personal assumptions subsequently made in a factual vacuum." *Id.* at 627.

Cir. 1989), where the Tenth Circuit said that "it is certainly conceivable that *particular jobs* may be completely incompatible with particular religious practices" and that in those cases "[i]t would be unfair to require employers faced with such irreconcilable conflicts to attempt futilely to resolve them. Employers faced with such conflicts should be able to meet their burden *by showing that no accommodation is possible.*" *Id.* (emphasis supplied).[5]

Here Amtrak did not and cannot claim that a train conductor at Amtrak cannot be accommodated. The fact that conductor positions, for which Rasch was qualified, exist at Amtrak demonstrates the inapplicability of the narrow exception to the active effort requirement.

II. The Trial Court Could Not Properly Grant Amtrak Summary Judgment Since Rasch Submitted Evidence That Amtrak, Upon The Exercise Of Reasonable Diligence, Would Have Found A Different Position For Rasch Which Would Have Accommodated His Sabbath Needs.

Many courts have recognized that the factual uniqueness of Title VII religious accommodation Sabbath observance cases often makes them poor candidates for summary judgment. *See Minkus v. Metro Sanitary Dist.*, 600 F.2d 80 (7th Cir. 1979); *Proctor v. Consolidated Freightways*, 795 F.2d 1472 (9th Cir.

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[5] In *Gordon v. MCI Telecommunications Corp.*, 791 F. Supp. 431, 436 (S.D. N.Y. 1992), the court, quoting *Toledo*, observed that "[w]hile it is 'conceivable' that an employer could carry its burden of proving undue hardship where no attempts were made at accommodation, 'such situations will also be rare.' "

1986); *Drazewski v. Waukegan Develop. Center*, 651 F. Supp. 754 (N.D. Ill. 1986); *Barlley v. West Point-Pepperell, Inc.*, 37 FEP Cases 1785 (N.D. Ga. 1985); *McCormick v. Board of Educ., Belvidere*, 32 FEP Cases 504 (N.D. Ill. 1983).

The determination of what constitutes a "reasonable accommodation" under Title VII and what is an "undue hardship" is a factual determination necessitating a complete development of the record and the taking of testimony on conflicting issues of fact to the extent that conflict exists. Similarly, "[t]he *magnitude* as well as the *fact* of hardship must be determined by the examination of the facts of each case." *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 134 (3d Cir. 1986), quoting *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

In this case there is evidence that prior to Rasch's termination on November 16, 1988, there was at least one position that would have accommodated Rasch's Sabbath beliefs. It is the same position that Rasch successfully bid for and received following his reinstatement.

On October 19, 1988, prior to Rasch's firing by Amtrak, an employee junior to plaintiff was awarded an assistant conductor's position in Salisbury, North Carolina, with Friday evenings and Saturdays off (A 583 at ¶ 6). It is thus clear that almost one month prior to plaintiff's discharge by Amtrak (November 16, 1988), there was a position available which plaintiff, because of his seniority, could have filled (and ultimately after his reinstatement through the grievance process did fill).

The district court was factually incorrect when it held that "the junior employee could not be bumped from the position until April, 1989 . . . ." (*See* 13a, *infra.*) In 1988 Rasch was on vacation for three weeks from September 19, 1988, to October 9, 1988 (A 634 at ¶ 4). Under the terms of the agreement between Amtrak and the union, an employee returning to work after being absent less than 30 days by reason of vacation is permitted to exercise his seniority on an assignment advertised and filled during his absence (A 59-60 at ¶ g). Thus, Rasch could have bumped the junior employee.

Upon returning from his vacation, Rasch phoned the crew caller at Amtrak to inquire whether he could hold a job with Saturdays off, but was advised that there was no such position available to him (A 634-35 at ¶ 5). There is no way that Rasch would have then known that an employee junior to him on the seniority roster had bid for the Salisbury, North Carolina position (*id.*).

Had Rasch known of the Salisbury position when he returned from vacation, under the terms of the collective bargaining agreement, he could have transferred to that position. On the other hand, had management personnel explored positions which could have accommodated Rasch, they would have or should have known that this position had been successfully bid by an employee junior to Rasch.

In fact, on October 20, 1989, after plaintiff's reinstatement, Stanley K. Eastman, Amtrak's EEO manager, in answering a letter from plaintiff, stated: "As I understand it, there have been some jobs within zone 5 which would allow you to take Friday evenings and Saturday off." (A 566i). This suggests that there

were more jobs than just the Salisbury, North Carolina, position which, had Amtrak investigated, could have accommodated Rasch's Sabbath requirements.

Since Amtrak prevailed in this case on the basis of a summary judgment, the Court must draw all inferences from the evidentiary sources in the record in a light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). A material issue of fact, therefore, existed which barred the award of summary judgment in favor of Amtrak.

III. The Holding In This Case That An Employer Is Excused From Considering An Accommodation Using Available Voluntary Substitutes Is In Conflict With The Decisions Of Other Circuits And Is Wrong As A Matter Of Law.

First the district court, although acknowledging that Amtrak never explored the possibility of allowing another employee to voluntarily work in Rasch's place (*see* 12a, *infra*), nevertheless erroneously held that "assigning substitutes, volunteers or not, to replace Rasch on his Sabbath would clearly violate the seniority system established by the collective bargaining agreement between Amtrak and UTU, Amtrak need not make such an accommodation." *Id.* at 16a).

This Court in *Hardison*, 432 U.S. at 81-82, observed that section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) "make[s] clear that the routine application of a bona fide seniority system would not be unlawful under Title VII," citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 352 (1977). Neither of the courts below, nor Amtrak, however,

pointed to any specific seniority provision of the collective bargaining agreement as being violated by voluntary swaps. Significantly, it was Amtrak, and not the union, that sought to use the seniority provision of the collective-bargaining agreement as a shield against its statutory obligation to reasonably accommodate.[6]

The decision of the trial court and the summary affirmance in the instant case is in direct conflict with a decision of the Ninth Circuit. In *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), that court faced a claim by an employer that it could not accommodate an employee's religious beliefs as to Sabbath observance "because any attempt at an accommodation would have caused undue hardship on its business." *Id.* at 1513. The court of appeals noted that the employer had relied on *Hardison* "for the proposition that, like TWA, it was bound by its union contract to schedule employees on the basis of seniority and cannot, therefore, be held liable." *Id.*

The Ninth Circuit, however, in a holding directly contrary to the opinion in the case here interpreted this Court's opinion in *Hardison* exactly 180 degrees different from the courts below, stating:

> Appellant's reliance on *TWA* is misplaced. The court in *TWA* addressed the degree of accommodation that was required of an employer within the framework of a seniority system. The court recognized that at a min-

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[6] *See Drazewski v. Waukegan Development Center*, 651 F. Supp. 754, 759 (N.D. Ill. 1986), which rejected the argument that the use of a voluntary swap is a violation of the collective bargaining agreement.

> imum, the employer was required to negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs. *Id.* at 75, 97 S. Ct. at 2272; *see also Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d at 401.
>
> The employer in *TWA*, for example, made several attempts to accommodate the religious practices of the plaintiff, including: (1) holding several meetings to try and solve the problem; (2) an authorized union search for someone who would exchange shifts, which was normal procedure; and (3) an effort to find another job in the company for the employee. *TWA*, 432 U.S. at 77, 97 S. Ct. at 2273.
>
> In the instant case, the district court found that Hacienda did nothing to solve the problem. Appellant essentially used the seniority provision of the collective-bargaining agreement as a shield against its statutory obligation to reasonably accommodate its employees' religious needs. "[n]either a collective-bargaining agreement nor a seniority system may be employed to violate [Title VII] . . . ." *TWA*, 432 U.S. at 79, 97 S. Ct. at 2274.

Id.

A Sixth Circuit case illustrates the confusion experienced by the courts in interpreting the *Hardison* holding regarding seniority provisions. The district court in *EEOC v. Arlington Transit Mix, Inc.*, 734 F. Supp. 804 (E.D. Mich. 1990), found that the em-

ployee's church attendance requirements could not be accommodated without incurring undue hardship due to the fact that the employer's drivers were represented by the Teamsters Union and worked pursuant to a seniority system. *Id.* at 809. The district court held:

> However, it is not unreasonable for an employer to allot benefits, assignments, shifts, or overtime opportunities by seniority among its employees whether required to do so by union contract or not. Seniority is a universally accepted mode of ranking employees, absent discriminatory purposes. The Court finds that "reasonable accommodation" does not require an employer to remove a more senior employee from the assignment or shift of his choice in favor of the religious preferences of a less senior employee.

Id. at 809.

The Sixth Circuit, however, reversed. First, the Sixth Circuit, citing this Court's decision in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 63 n.1, stated:

> Title VII prohibits an employer from discharging an employee because of his religion. To avoid such unlawful discrimination, an employer must attempt to accommodate an employee's religious needs. The extent of this obligation is spelled out in the Act's definition of religion, which reads as follows: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an

> employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

EEOC v. Arlington Transit Mix, Inc., 975 F.2d 219, 221 (6th Cir. 1991).

The Sixth Circuit, in dealing directly with a seniority argument, then stated:

> The new scheduling policy was implemented on June 25, 1987. There is no evidence that, between that date and Taylor's dismissal, Arlington made any effort to find a way to avoid the collision. Mechanic Dana Justice testified that he would have exchanged shifts had he been asked to do so. Abraham acknowledged that he never told Taylor he could switch shifts with Justice if the latter were willing, nor did he discuss the matter with Justice. *At a minimum, Arlington had an obligation to explore a voluntary waiver of seniority rights before terminating Taylor.* After failing to pursue this or any other reasonable accommodation, the company is in no position to argue that it was unable to accommodate reasonably his religious needs without undue hardship on the conduct of its business.

Id. at 222 (emphasis supplied).

The EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. §§ 1605.1-1605.3, 45 Fed. Reg. 72610-15 (1980) (*see* p. 20a, *infra*), in addressing an employer's accommodation duties, states:

> Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

29 C.F.R. § 1605.2(d)(1)(i), 45 Fed. Reg. 72610 (1980).

This Court's holding in *Hardison* does not proscribe the use of voluntary substitutions in the context of a bona fide seniority system. Utilizing such swaps as an accommodation device does not result in rendering a bona fide seniority system unlawful under Title VII. *See Hardison*, 432 U.S. at 82. Neither would the use of such an accommodation result in the denial of the shift and job preference of an innocent employee or deny such an employee his contractual rights which was this Court's concern in *Hardison*. *Id.* at 81.[7]

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[7] In *Boomsma v. Greyhound Food Management, Inc.*, 639 F.

The use of a voluntary swap does not result in penalizing one employee in order to accommodate the religious beliefs and practices of another employee since no worker is placed in a less advantageous position than he or she was in prior to making a swap accommodation. Thus, there would be no "economic penalt[y] . . . imposed on innocent incumbent employees." *See Frank v. Bowmen Transp. Co., Inc.*, 424 U.S. 747, 794 (1976) (Powell, J., concurring in part and dissenting in part). Thus, in striking the balance between accommodating under section 701(j) and respecting the existent seniority system, the balance must tip in favor of the use of a no cost, no harm accommodation such as a voluntary swap.

If the lower courts in the instant case are correct in their interpretation of this Court's holding in *Hardison* mandating an absolute and wooden application of seniority principles over accommodation, then Justice Marshall was surely correct in his *Hardison* dissent when he stated that the majority's opinion "deal[t] a fatal blow to all efforts under Title VII to accommodate work requirements to religious prac-

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Supp. 1448, 1455 (W.D. Mich. 1986), the court rejected the argument that under *Hardison* voluntary substitutions are not a permissible accommodation, stating "[t]he Supreme Court held in *Hardison* only that an employer could not require an employee to fill the overtime hours of another employee who refused to work because of his religious beliefs; it explicitly noted that no employee had volunteered to fill the affected employee's hours in the case before it. *Hardison*, 432 U.S. at 78 and 80-81 . . . ." The court also observed that "[t]he EEOC, moreover, has explicitly recognized voluntary substitutions or swaps as one way for an employer to fulfill its statutory obligation of reasonable accommodation."

tices." *Hardison*, 432 U.S. at 86 (Marshall, J., dissenting).

IV. An Employer May Not Under Title VII Lawfully Ignore Its Own Progressive Discipline Policy For The Sole Reason That An Employee's Work Absences Are Compelled By Religious Beliefs Particularly When The Employer Has Failed To Make Any Active Bona Fide Effort To Accommodate.

Neither the district court nor the court of appeals considered Rasch's contention that Amtrak failed to follow its own progressive discipline policy and as a result violated its duty under Title VII. Once an employer has been told of a Title VII accommodation need, a firing is an abuse of company discipline policy in the absence of actual present hardship to the company or its employees. This is because until facts or circumstances arise from which it can be determined that an accommodation can no longer be provided without undue hardship, Title VII (once triggered on behalf of an employee) requires that the religious needs and practices be accommodated. To set a lesser standard would "emasculate this law designed to protect religious liberty and the free exercise of religious practices." *Brown v. General Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979), quoting *Haring v. Blumenthal*, 471 F. Supp. 1172, 1182 (D. D.C. 1979). Obviously, if there was a position available in Salisbury, North Carolina, which would have accommodated Rasch's religious needs and if information of such a position was reasonably available to Amtrak's supervisory personnel (as it was) before Rasch's discharge, clearly the discharge violated Title VII.

Rasch was fired by Amtrak on November 16, 1988, not because Amtrak had exhausted all efforts at attempting to accommodate Rasch's religious needs without causing undue hardship to the business of the company, but rather purely as a discipline for Rasch's failure to comply with a claimed conflicting employment requirement (A 269, 617 at ¶ 13).

Rasch, in his grievance appeal, specifically claimed the penalty administered to him was unduly harsh and excessive (A 646-47). Amtrak's reason for not administering its progressive discipline policy when it terminated Rasch, however, was based upon the fact that Rasch was unavailable for work due to his religious beliefs. W. L. Pierce, Division Manager of Labor Relations at Amtrak stated:

> Likewise in your case you clearly indicated before the hearing and in your testimony at the hearing that you would not be available for service between sunset Friday and sunset Saturday because of religious beliefs.[8] Therefore, it was clear that progressive discipline would not act as a corrective measure in your case. The record plainly demonstrates that you were guilty as charged. In view of the above, the discipline assessed was not arbitrary, harsh or excessive and your appeal is denied.

In this case not only did Amtrak discharge Rasch for absenteeism, but it did so without utilizing its own

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[8] In order for Rasch to make a *prima facie* case, he is required to notify his employer of the religious reason for the scheduling conflict. Thus, Rasch was treated differently from other employees for carrying out a duty imposed upon him by Title VII.

progressive discipline policy. Its excuse for ignoring its own policy was the knowledge that Rasch's absences were dictated by his religious convictions. If the progressive discipline policy had been followed, Amtrak would have had additional time to look for an accommodation (an accommodation which at a minimum became available in Salisbury, North Carolina, even before Rasch's firing).

In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986), this Court reversed and remanded with instructions to the lower court to determine whether a collective bargaining provision as to leave with pay had been "doled out in a discriminatory fashion." The Court stated that failure to provide a religious observer with the same employment benefits for religious needs as provided for secular concerns "would display a discrimination against religious practices that is the antithesis of reasonableness." *Id.*[9] Similarly, it was improper for Amtrak to discriminate in the use of its progressive discipline policy on the basis that the work absences resulted from religious compulsion. Amtrak not only violated Title VII by its failure to attempt any accommodation, but it compounded the violation by an intentional act of sidestepping its own progressive discipline policy.

SUMMARY

In summary, this Court should grant certiorari to insure greater uniformity among the circuits in deal-

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[9] Justice Stevens, in a claim brought under the Free Exercise Clause seeking unemployment compensation, underscored the fact that it is "unequal treatment" when benefits are withheld because of an individual's "religiously motivated choice." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring).

ing with the twin issues of "reasonable accommodation" and "undue hardship" which must be addressed in every religious accommodation case.

The district court in its summary judgment opinion stands the religious accommodation requirement of Title VII on its head. The district court not only gutted Title VII's religious accommodation requirements, but it did so without even affording Rasch his day in court when there is, without question, evidence suggesting that when Rasch was fired there was one or more positions available which would have accommodated his religious needs.

The lower courts' decisions here are in conflict and inconsistent with the religious accommodation provisions of Title VII and the EEOC Guidelines on Religious Discrimination. This case is of exceptional importance because if an employer the size of Amtrak can refuse to make any bona fide attempt at accommodation, Title VII's religious accommodation requirements will have become a dead letter.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted.

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